FILE COPY

Supreme Court, U. S.
FILED
AUG 4 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 29.

ELMIRA NICHOLS and PAULINE THOMPSON,
Appellants,

against

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR APPELLANTS.

OSMOND K. FRAENKEL,
SIDNEY S. GRANT,
SAMUEL E. ANGOFF,
of Counsel.

ACKERMAN PRESS, Inc., 142 Liberty St., 'Phones Rector 2-5356-7

INDEX.

PAGES

I. Opinion of the Court Below 1

II. Jurisdiction 1

III. Statement of the Case 3

POINT I. Appellant's conviction was without due process of law in violation of their right of freedom of speech and of the press 3

POINT II. Appellants' conviction was without due process of law in that they were not charged with the offense of which they were convicted 13

Conclusion 14

TABLE OF CASES CITED.

Anderson, In re, 69 Nebr. 686, 96 N. W. 149 ..... 10, 11

Campbell, In re, 64 Calif. App. 300, 221 Pac. 952 8
C. I. O. v. Hague, 25 F. Supp. 127 8
City of Chicago v. Schultz, 341 Ill. 208, 173 N. E. 276 7
City of Newark v. Hill, 1 I. J. A. Bull. No. 12, page 2 8
Commonwealth v. Davis, 162 Mass. 510 11
Commonwealth v. Kimball, 1938 Mass. Adv. 267, 13 N. E. (2d) 18 ..... 3, 10
Coughlin v. Sullivan, 100 N. J. L. 42, 162 A. 177 8
Cox, In re, 122 N. J. L. 150 7

Dearborn Publishing Co. v. Fitzgerald, 271 Fed. 479 8
DeJonge v. Oregon, 299 U. S. 353 ..... 6, 14

Hague v. C. I. O., 59 Sup. Ct. 954 ..... 2, 9, 11, 12
Herndon v. Lowry, 301 U. S. 242 ..... 4, 6, 13

Lovell v. Griffin, 303 U. S. 444 ..... 2, 3, 5, 7, 8, 9, 10, 11

PAGES

Milwaukee v. Kassen, 203 Wisc. 383, 234 N. W. 352 10

New Rochelle v. McCormick, Westchester L. J., June 11, 1935, page 997 7

People v. Armentrout, 118 Calif. App. 761, 1 P. (2d) 556 8

People v. Armstrong, 73 Mich. 288, 41 N. W. 275 7

People v. Finkelstein, 4 L. R. R. 77 9

People v. Gilione, 3 L. R. R. 597 9

People v. Goren, 4 I. J. A. Bull. No. 3, page 3 8

People v. Johnson, 117 Misc. 133, 191 N. Y. Supp. 750 8

People v. Jones, 7 I. J. A. Bull., page 31 10

People v. St. John, 108 Calif. App. 779, 288 Pac. 53 10

People v. Taylor (Superior Court of Calif., App. Dept.). 9

People v. Toth, 2 I. J. A. Bull. No. 5, page 2 8

People ex rel. Gordon v. McDermott, 169 Misc. 743 .. 9

Pierce, Ex parte, 127 Tex. Cr. 35, 75 S. W. (2d) 264 7

San Francisco Shopping News Co. v. City of South San Francisco, 69 F. (2d) 879 10

Schenck v. United States, 249 U. S. 47 7

Sieroty v. City of Huntington Park, 111 Calif. App. 377, 295 P. 564 10

Star Company v. Brush, 185 App. Div. 261, 172 N. Y. Supp. 851 8

Stromberg v. California, 283 U. S. 359 ..... 4, 6

United States v. Butler, 297 U. S. 1 5

United States v. Carolene Products Co., 304 U. S. 144 5

TABLE OF STATUTES.

United States Constitution, 14th Amendment 2, 3

United States Judicial Code, Sec. 237 b 1, 2

Worcester, Mass., Revised Ordinances, Chapt. 36, Sec. 12 2

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 29.

ELMIRA NICHOLS and PAULINE THOMPSON,
Appellants,

against

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR APPELLANTS.

I. Opinion of the Court Below.

The opinion below was reported in Mass. Adv. 1938, page 1969; 18 N. E. 2nd 166.

II. Jurisdiction.

1. The statutory provision is Judicial Code, Section 237-b, as amended by the Acts of February 13, 1925 and March 8, 1934, U. S. C., Title 28, Section 344-b.

2. The date of the judgment is December 21, 1938, on which date the Massachusetts Supreme Judicial Court affirmed the conviction herein (R., 20). No application for rehearing was made.

3. The nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237-b, supra.

Claim of federal constitutional right was raised by a motion to dismiss at the original trial held in the Central District Court of Worcester and there overruled and was again raised upon a trial had de novo in the Superior Court for Worcester County and likewise denied (R., 7). The Supreme Judicial Court of the State in its opinion specifically passed upon the claim of federal right and overruled the same (R., 21 ff.).

The federal right claimed by appellants is that the ordinance under which they were convicted is, upon its face, as applied to them, unconstitutional in denying to them due process of law under the Fourteenth Amendment to the United States Constitution: This claim is grounded upon the contention that appellants' right to freedom of speech and freedom of the press were violated by the prohibition of the distribution of handbills contained in said ordinance (Ch. 36, § 12, Revised Ordinances of Worcester —R., 21) and by the insufficiency of the charge upon which they were tried. The ordinance in question is as follows:

> "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the City any rubbish without first covering or fastening such rubbish so as to prevent the same from being blown or scattered about in the streets."

4. The following cases, among others, sustain the jurisdiction:

Lovell v. *Griffin*, 303 U. S. 444;
Hague v. *C. I. O.*, 59 Sup. Ct. 954.

5. This Court noted probable jurisdiction on May 1, 1939.

III. Statement of the Case.

Appellants were charged with distributing handbills on city streets in violation of the city ordinance (R., 9, 13). The leaflet announced the holding of a meeting to discuss unemployment insurance and relief (R., 8). The distribution was in an orderly and peaceful manner and appellants did not themselves throw any of the leaflets away (R., 6). The only contention was that others had thrown such leaflets on the street and that approximately 15 leaflets were on the sidewalk and 15 in the street (R., 6).

The State Court held that the validity of the ordinance was established by its own previous decision in *Commonwealth* v. *Kimball*, 13 N. E. 2nd 18. The *Lovell* case was distinguished on the ground that the ordinance there struck down was not a regulation of the use of the streets. The Court interpreted the ordinance in the case at bar as directed to the prevention of the accumulation of litter and rubbish and the annoyance of travelers. It construed the ordinance as not preventing the casual passing of papers from one person to another, nor the sale of newspapers or other printed matter.

POINT I.

Appellants' conviction was without due process of law in violation of their right of freedom of speech and of the press.

This Court having, in *Lovell* v. *Griffin*, 303 U. S. 444, ruled that the Fourteenth Amendment protects leaflet distribution, the question now arises whether such protection can be destroyed under the pretext of preventing the littering of streets. That municipalities may punish street littering is, of course, not disputed. But in the case at bar the offense charged was not littering, but distribution. Re-

spondent justifies the charge on the ground that littering resulted from the distribution. It is, however, not claimed that appellants themselves littered the streets, and indeed the evidence is to the contrary. The only claim is that some of the persons who accepted the literature which appellants handed out, subsequently threw it away (R., 6).

If the offense charged against appellants had been littering and the proof had been only that here adduced, serious questions of proximate cause would have been raised. However, since the offense charged was not littering, but distribution, the conviction can be upheld only if a municipality may prohibit an act harmless in itself on the theory that in some instances harm may result from that act. It is submitted that his Court has, in *Stromberg* v. *California*, 283 U. S. 359, ruled otherwise. In that case a conviction for display of a red flag in "opposition" to government was reversed because the statute made no distinction between opposition manifested by lawful means or such opposition when manifested by unlawful ones. A similar view was expressed by Mr. Justice Roberts in *Herndon* v. *Lowry*, 301 U. S. 242, at page 259:

> "And where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained."

So in the case at bar the statute punishes distribution unaccompanied by littering, as well as distribution which has such consequences.

But, if it be argued that the State Court has, by its construction of the ordinance, limited its application to distribution likely to result in littering (see R., 23), we never-

theless believe that the ordinance violates constitutional guaranties. Justification for an ordinance of this more limited character is sought in the police power. And it is argued that, since municipalities have the right to prevent littering, the Courts may not inquire whether the means used are appropriate or necessary. With this principle of judicial self-restraint (compare Mr. Justice Stone dissenting in *United States* v. *Butler*, 297 U. S. 1, at 78) counsel would be the last to disagree. But it is submitted that this principle has no application to the problem now before the Court.

For when the police power comes into conflict with the basic democratic rights of freedom of religion, press and assembly, the conflict must be resolved in different terms. See suggestion by Mr. Justice Stone in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, note 4. This Court, in the *Lovell* case, recognized the importance in American life of the political pamphlet. In these troubled times the free distribution of varying points of view is of the utmost importance. There are many groups in the community, religious, political or economic, who are not able to command either the radio or the press for the distribution of their ideas. The only way that they can be heard is by the distribution of leaflets and pamphlets. Such distribution, in order to reach the general public, must be on the public streets. It is absurd to suppose that any effective circulation of minority opinion is possible in communities where ordinances of the kind now under review are permitted to operate. The contention that such ordinances are directed against littering and not against distribution is specious and should not receive the sanction of this Court. To stop littering no such drastic ordinance is needed.

To say that the Courts may not consider the necessity for the restriction upon freedom of speech and of the press because of a claim that the police power has been exercised

would result in the destruction of such basic rights. Therefore, restriction of these rights is permissible only when necessary to prevent serious evil to the state. That was recognized in *Stromberg* v. *California*, supra, where the Court upheld part of the statute there under consideration because it punished incitement to the overthrow of organized government by unlawful means.

In *De Jonge* v. *Oregon*, 299 U. S. 353, the Chief Justice said:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.
>
> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

In *Herndon* v. *Lowry*, supra, this Court held unconstitutional a statute which punished an attempt to incite insurrection by persuasion because the utterances upon which the prosecution rested were themselves not unlawful. Mr. Justice Roberts, speaking for the majority of the Court, rejected the contention of the state in that case that utterances having a "dangerous tendency" could be punished. He said:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."

And applicable to this situation is also the statement of Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, at page 52:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

The *Lovell* case carried these views to their logical conclusion in condemning an ordinance which banned all leaflet distribution.

Even before the decision of this Court in the *Lovell* case there had been numerous decisions declaring unconstitutional similar ordinances. The earliest of these was *People* v. *Armstrong*, 73 Mich. 288, 41 N. W. 275 (1889).

See to like effect:

City of Chicago v. *Schultz*, 341 Ill. 208, 173 N. E. 276 (1930);

Ex parte Pierce, 127 Tex. Cr. 35, 75 S. W. 2nd 264 (1934);

In re Cox, 122 N. J. L. 150 (1937);

New Rochelle v. *McCormick*, Westchester L. J., June 11, 1935, page 997.

See also various unreported cases, such as:

City of Newark v. *Hill*, 1 I. J. A. Bull. No. 12, page 2;
People v. *Toth*, 2 I. J. A. Bull. No. 5, page 2;
People v. *Goren*, 4 I. J. A. Bull. No. 3, page 3.

See also 5 I. J. A. Bull., page 147;
Cf.

Star Company v. *Brush*, 185 App. Div. 261, 172 N. Y. Supp. 851 (1918);
Dearborn Publishing Company v. *Fitzgerald*, 271 F. 479 (1921);
In re Campbell, 64 Calif. App. 300, 221 Pac. 952 (1923);
People v. *Armentrout*, 118 Calif. App. 761, 1 P. 2nd 556 (1931).

In some cases the Courts have limited the application of similar ordinances to commercial literature on the ground that any application of the ordinances to pamphlets generally would be an unconstitutional deprivation of free speech. See:

People v. *Johnson*, 117 Misc. 133, 191 N. Y. Supp. 750 (1921);
Coughlin v. *Sullivan*, 100 N. J. L. 42, 162 A. 177 (1924).

Since the decision of this Court in the *Lovell* case, there have been decisions to like effect. In *C. I. O.* v. *Hague*, 25 F. Supp. 127, Judge Clark of the District Court of New Jersey considered that case controlling with regard to an ordinance of Jersey City which banned the distribution of leaflets on streets and public places. He recognized that ordinances having the broad sweep of the ordinance now

before the Court are designed rather to restrict the circulation of ideas than to prevent the littering of streets, saying:

> "The strategy is the use of ordinances designed and phrased to protect the streets against being littered with the consequent clogging of sewers, fire and disease hazards and the traditional frightening of horses, for the purpose of protecting the minds of the people who walk those streets against being littered with certain kinds of ideas and again, traditionally perhaps, being frightened."

In the Circuit Court of Appeals this portion of the decree of the District Court was unanimously upheld. Judge Biggs held the ordinance to be "squarely within the decision" of the *Lovell* case.

In this Court also the ordinance was held void on its face within the *Lovell* case (59 Sup. Ct. 954, 965). Indeed this Court struck out from the decree of the Court below (see 101 F. 2nd 774, at 795) provisions which so restricted the injunction that it would not be applicable where the leaflets were distributed in such a way as to cause littering of the streets.

In *People* v. *Taylor*, the Appellate Department of the Superior Court of California, for the County of San Diego (not yet reported), affirmed a dismissal of a charge based on an ordinance which, like the ordinance now before the Court, prohibits the distribution of leaflets upon any street, park or public place. See also:

> *People ex rel. Gordon* v. *McDermott*, 169 Misc. 743;
> *People* v. *Gilione*, 3 L. R. R. 597;
> *People* v. *Finkelstein*, 4 L. R. R. 77.

For other unreported cases see 7 I. J. A. Bull. No. 1, page 4 (numbered 162 in error).

On the other hand, in addition to the case at bar, and the two other cases now before this Court, a contrary result was reached by the Appellate Department of the Superior Court of California in the case of *People* v. *Jones*. (See Los Angeles Daily Journal, August 9, 1938, and 7 I. J. A. Bull., p. 31; see also unreported cases cited in footnote 15, on p. 32.)

These decisions rested in part on earlier decisions in the same jurisdictions, in part on an attempted distinction between the ordinances in question and the ordinance involved in the *Lovell* case. The earlier cases relied on are in the main inapplicable. Thus in the case at bar the Court relied upon *Commonwealth* v. *Kimball*, 1938 Mass. Adv. 267, 13 N. E. 2nd 18. In the *Snyder* case the Court relied on *Milwaukee* v. *Kassen*, 203 Wisc. 383, 234 N. W. 352; in the *Young* case the Court relied on *People* v. *St. John*, 108 Calif. App. 779, 288 Pac. 53; *Sieroty* v. *City of Huntington Park*, 111 Calif. App. 377, 295 Pac. 564; *San Francisco Shopping News Company* v. *City of South San Francisco*, 69 F. 2nd 879, certiorari denied 293 U. S. 606, and *In re Anderson*, 69 Nebr. 688, 96 N. W. 149.

In the *Kassen* case the Court rested its conclusion largely on the *Anderson* case; besides appellant conceded the validity of the ordinance. In the *Kimball* case the constitutional issues were given scant consideration by the Court. In the *Sieroty* case and the *San Francisco Shopping News Company* case no question of free speech was involved or even discussed, since the ordinances were aimed only at advertising matter. In the *St. John* case, which also dealt only with advertising matter, the Court expressly doubted whether it would be possible to prohibit distribution of religious and political pamphlets without interfering with the constitutional guaranty of free speech.

The *Anderson* case, which is the chief reliance of the prosecution in all these distribution cases, is really not an authoritative decision at all. It is clear that the defend-

ants in the *Anderson* case actually did the littering, since the Court distinguished between their acts which constituted distribution "upon the sidewalk" and other acts prohibited by the ordinance, namely, the handing of circulars to others on the public streets. But in any event the weight of authority, as indicated by the cases previously cited, is against the proposition that *distribution*, as distinguished from *littering*, can be prohibited. It is interesting to note, moreover, that in the *Anderson* case the Court justified its conclusion by citing *Commonwealth* v. *Davis*, 162 Mass. 510. The *Davis* case was considered to be authority for the view that a statute forbidding public meetings in a public park violated no rights of free speech—this Court has now repudiated that view in the *Hague* case.

The chief distinction attempted in the three cases now before this Court is that the ordinance in the *Lovell* case applied to distribution *throughout the city limits*, whereas the ordinance in the other cases applied only to distribution *on the city streets*. It is submitted that that distinction has no validity. Many of the cases cited above held ordinances unconstitutional which were restricted only to distribution on the streets or in public places. Such, notably, was the situation in *Hague* v. *C. I. O.*, supra.

The second ground of distinction taken is that the ordinance in the *Lovell* case was not aimed at street littering, whereas the ordinance in the case at bar was so aimed. In support of that argument reliance is placed in the case at bar (R., 24) on the statement by the Chief Justice in that case:

> "It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."

It is submitted that the reference in that opinion to littering of the streets was intended to refer to the littering of streets by the person charged with the violation of the ordinance. In the case at bar the ordinance is not limited to distribution accompanied by street littering on the part of such distributor; indeed, as construed, it may not be limited to littering by others actually resulting from distribution since the opinion of the State Court might justify a conviction even though no actual littering resulted, because all distribution tends to produce littering (R., 21, 23).

Even an ordinance limited to distribution resulting in littering would be void because, as we have seen, freedom of speech and of the press can be restricted only where serious danger to the state is shown. Surely no one will contend that such freedom can properly be restricted merely because of fear of street littering. Moreover in order to prevent street littering means other than the complete prohibition of distribution can be employed. Municipalities can provide receptacles for waste paper, they can increase their street cleaning force, they can probably most effectively stop street littering by arresting the actual litterers.

Finally, there is an underlying fallacy in the argument that all leaflet distribution may be prohibited because of the possible littering by the recipients. By the same logic it could be argued that all street meetings could be prohibited because of the possibility that listeners to the speakers might obstruct traffic or because some of the listeners might offer violence to the speaker. This last, indeed, was the argument advanced by Mayor Hague in the *C. I. O.* case which has met with rebuff from this Court. In such situations the evil which the municipality may correct, namely, street littering, obstruction of traffic or disorderly conduct can be prevented by the punishment of those actually committing the wrong, not by prohibition of a lawful act. As a speaker, whose address is lawful, is entitled to police

protection against persons who might break up his meeting and cannot be arrested as a disturber of the peace, even though they use his speech as a pretext for violence, so the distributor of a pamphlet entirely lawful in its contents should not be subject to arrest because someone who accepts the pamphlet from his hands later throws it away.

POINT II.

Appellants' conviction was without due process of law in that they were not charged with the offense of which they were convicted.

Appellants in the case at bar were charged with the violation of an ordinance which prohibited distribution of literature (R., 9, 13). They were convicted of having distributed the literature in a manner such that street littering resulted (R., 23).

Even if it be assumed, as has been done in the foregoing discussion, that a statute is constitutional which punishes distribution because of the littering which may result from such distribution, it is submitted that the conviction in the case at bar fails to meet the requirements of due process of law.

It is settled that it is not only the interpretation of a statute which controls, but also the manner in which the statute is applied to the facts in the particular case. See *Herndon* v. *Lowry*, supra. Therefore, even if the statute as construed is constitutional so that a distributor might be punished upon proof of littering caused by others, nevertheless he cannot be so punished unless he is charged with such offense. If, as claimed by the prosecution this ordinance could be upheld as valid because it has been interpreted to apply only to cases where the distribution produces littering, then the charge should have been as broad

as the ordinance. To charge a person with distribution and to convict him of distribution resulting in littering is in itself a denial of due process. See the statement of the Chief Justice in the *De Jonge* case, supra, at page 362.

In the *De Jonge* case defendant had been charged with speaking at a meeting, not with anything which he did at the meeting. There was some evidence to indicate that he had distributed literature at the meeting containing illegal statements. An attempt was made at the argument of the case in this Court to suggest that the conviction could be justified on the basis of this evidence, but it was clearly pointed out by several of the Justices during the argument that no such conviction was permissible since no such charge had been made. And in his opinion the Chief Justice characterized such a possibility "as sheer denial of due process." So, in the case at bar, it would be such sheer denial to justify a conviction on proof of littering in a case where the complaint contained no reference whatever to littering. Surely defendants had a right to suppose that they were being charged with distribution only and to secure an acquittal because such distribution was wholly lawful.

CONCLUSION.

The judgment appealed from should be reversed and the complaint dismissed.

Respectfully submitted,

OSMOND K. FRAENKEL,
SIDNEY S. GRANT,
SAMUEL E. ANGOFF,
of Counsel.